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JAMES H. McKENNEY,
Clerk.

Def. of Simrall v Trabue for D. C.

# Supreme Court of the United States.

Filed Mar 5, 1900.

October Term, 1898.

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THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, - - - - - Plaintiff in Error,

vs.

ADOLPH L. SCHMIDT, in his own behalf, and as Trustee for the Bondholders of the Northern Division of the Cumberland & Ohio Railroad Company, et al, - - Defendants in Error.

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## BRIEF FOR DEFENDANTS IN ERROR.

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# Supreme Court of the United States.

**October Term, 1898.**

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## BRIEF FOR DEFENDANTS IN ERROR.

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### STATEMENT.

For brevity's sake we shall not re-state the facts, but rely upon the former briefs for statement, except sufficient to make this brief self-explanatory.

This suit was begun October 12, 1885, against plaintiff's vendor, to enforce the lien of a mortgage upon the earnings of plaintiff's railroad, previously owned by the Louisville, Cincinnati & Lexington Railway Company (hereinafter called L., C. & L. Co.), the mortgagor.

The case was stubbornly contested (really by plaintiff in error as hereinafter shown) in the Circuit Court and Court of Appeals—having made five appeals to the latter Court—until after more than eight years' litigation, judgment was entered June 1, 1894, ascertaining the net earnings covered by the mortgage to be $53,565.62, with interest, etc. (Rec., 214.)

Responsive to a rule to pay the earnings, the mortgagor said:

> "That in 1881 it sold and conveyed, for a consideration paid at the time, all its property, rights, privileges and franchises except the mere franchise to exist, and that it distributed the proceeds of such sale among its various stockholders, and since said time it has had no property, assets or funds of any kind with which to comply with the order of this Court, and it is therefore unable to pay said sum, or any other sum, for the simple reason that it has no property or assets with which to do it. HELM & BRUCE,
> (Rec., 215.) *"Attorneys for Defendant."*

To a rule to report the amount of net earnings accruing after the period covered by the judgment for $53,565.62, the mortgagor said that it

> "States and shows to this Court that it has not made any net earnings, or earnings of any kind, since the date aforesaid, on business coming to it from or over the Cumberland & Ohio road, nor has it made earnings of any kind, since it does not own any railroad or property of any character whatever, and has not since the date aforesaid. HELM & BRUCE,
> *"Attorneys for Defendant."*

"M. H. Smith says that he is the President of the defendant, and that he believes the statements contained in the foregoing response are true." (Rec., 217.)

The unnamed vendee referred to in the responses was plaintiff in error (hereinafter sometimes called L. & N.)

Afterward, plaintiffs (defendants in error) tendered an amended petition showing that the defense of the suit had been made by the L. & N., who, it appeared, was the sole person interested in the property involved, and prayed that it be named a defendant of record, but its motion was overruled, and the order affirmed on appeal, the appellate Court declaring the proper practice to be either to institute a new suit against L. & N. upon the record of the present suit, or file an affidavit containing the averments of the amended petition, and thereupon obtain a rule against L. & N. to pay into Court the amount of the net earnings received by it covered by the mortgage, if the averments of the amended petition were established. (99 Ky., 148, 155; Appendix to former brief, p. 25.)

To such rule the L. & N. responded :

1. That it was not a party to the suit ; had not been named in a pleading, etc., etc.

2. That it could never "with propriety have filed an answer setting up its defense" at any time, and that to require it to pay into Court, as required, would deprive it of its property without due process of law. That if sued "in the usual and orderly way," it "could and would present good, valid, and subsisting defense."

3. That even if adjudged to pay, respondent (L. & N.) owned 250 coupons amounting to $16,524.37, etc., which should be credited.

4. That this suit was against L., C. & L. Co. on its contract, etc.; setting out at length matters which it is now urging in its brief, and alleging that the lease itself forbade assignment without lessor's consent, and the lessor had refused consent, and concluding:

"Wherefore, *having fully responded*, this respondent prays that the rule herein be discharged." (Rec., 295.)

Defendants in error replied to the response by affidavit filed March 23, 1898, asserting *res adjudicata* of the matters set up in the fourth item of the response, covering the assignment of the lease and the lessor's refusal to yield consent thereto; and showing that of the credit of $16,524.37, claimed in the response, $6,626.65 had already been credited in the judgment ascertaining the mortgaged earnings.

Upon the response and reply thereto, and upon the rule and affidavit of Schmidt, "and upon the entire record and proceedings of this action which have been heretofore ordered to be and are now read upon this hearing," etc., the Court, April 2, 1898, adjudged that the rule be made absolute, and that the plaintiff in error pay into Court the said earnings fixed at $90,003.34, subject to the credits adjudged in detail.

Upon appeal this judgment was affirmed as a "delay case" October 28, 1898. (Rec., pp. 308, 317.)

## ARGUMENT.

### I.

### Plaintiff in Error had Opportunity of Full Hearing of All Its Defenses on the Rule.

From the elaborate proceedings on the rule just recited in the statement, it appears that plaintiff in error was accorded full hearing of every defense urged; that it urged several defenses personal to itself and not therefore adjudicated, and that some were adjudged in its favor; others were refuted by the reply of the defendants in error, and adjudged against it; and that still others were abandoned by it on fuller information as to the credits which it was claiming. It intimated that it had other defenses, but gave no evidence thereof, notwithstanding it had set up such defenses as it chose, and all those received full and fair trial.

Whether, therefore, the judgment awarding the rule contemplated the trial of the defenses which were actually tried or not, nevertheless plaintiff in error had a fair trial of those defenses, and there is no reason to suspect would not have had a fair trial of any other defenses urged, and a trial on rule and response, or even on motion, does not offend the constitutional provision of due process of law. (*Iowa Central Railway Company vs. Iowa, 160 U. S., 389; Brown vs. New Jersey* (*No. 290*), *decided November 20, 1899, advance sheets.*)

## II.

### Evolution of Plaintiff's Claims.

Plaintiff's doctrines have undergone such evolution during the progress of this case that it is difficult to keep pace with them.

*a.* In 1891—April 20—its counsel supposed plaintiff in error was the actual litigant defendant (and there being but one, the only litigant defendant), and in retiring from the case gave plaintiff this notice:

LOUISVILLE LAW AND EQUITY COURT.

SCHMIDT, . . . . . *Plaintiff,*
vs.
L., C. & L. R'Y CO., . . *Defendant.*
} No. 1860. Notice.

*The Louisville & Nashville Railroad Company* will take notice that on Monday, April 20, 1891, at the motion hour, we will move the Court to strike our names from the record herein as attorneys for said company.

BARNETT, MILLER & BARNETT.

This notice was accepted by present counsel for plaintiff in error as follows:

NOTICE ACCEPTED.

HELM & BRUCE,
*Attorneys for Defendant.*

Thereupon the Court recited:

Came Barnett, Miller & Barnett and filed a written notice in this action duly accepted.

And on their motion their names are stricken from the record herein as attorneys *for Louisville & Nashville Railroad Company.* (Rec., p. 79.)

Promptly thereafter, said Helm & Bruce took depositions of divers L. &. N. officers.

Of H. M. Smith, who verified the response (Rec., 217), and who swore that he was the President of the Louisville & Nashville Railroad Company.

Of Edward Rowland (Rec., 174), Auditor of Receipts of the Louisville & Nashville Railroad.

Of Charles Haydon (Rec., 174), Assistant Comptroller of the Louisville & Nashville Railroad. And Haydon testified that his account was made out in his (L. & N.) office, from L. & N. books.

Sewell, author of the report of earnings, was Auditor of Disbursements of the Louisville & Nashville Railroad Company. (Rec., 72.)

It sounds strange, therefore, when plaintiff now asserts: "That it is not a party to this suit," etc., and that there has never been a time when it could "with propriety, have filed an answer setting up its defenses," etc. (Rec., 294.)

*b.* It is equally interesting to note the transition from plaintiff's position in the State Court to that in its brief, page. 37. In the former it said (99 Ky., 143; Plaintiff's abstract, p. 37):

> "This is not a case where one party—the real party in interest—defends the suit in the name of another. The fact that this suit was defended by counsel who represent the L. & N., and the fact that the same man was President of both companies should not operate to bind by a judgment one who was not a party to the suit in which it was rendered;"

But in its brief in this Court (p. 37) it concedes:

> "That if it (L. & N.) should be sued by plaintiffs (defendants in error), that judgment (the judgment now assailed) would be conclusive evidence against it on the *certain points adjudicated therein*, as, for example, on the question so bitterly contested, as to whether the contract covered the earnings on business account both ways or only one way, and on the item of the amount of such earnings."

This evolution and consequent elimination reduces the field of discussion to a narrow limit, viz.: if by the judgment assailed plaintiff in error was prevented from availing of any defense it had, if any, in addition to those it urged in the name of the L., C. & L. Co., and if so, if its property was thereby taken without due process of law.

The proposition of law as announced by the State Court, and sustained by the overwhelming weight of authority which was so bitterly contested by plaintiff in error, is now conceded by its counsel to the extent of the "*points*" actually "*adjudicated therein.*" (Brief, 37.) Plaintiff is now reduced to the contention that it is not concluded on any question not actually decided, although plaintiff had complete control of the defense, had an untrammeled right to cause the adjudication of any question it chose, and every question it ever raised was fully adjudicated.

PLAINTIFF'S STATEMENT OF ITS POSITION.

Plaintiff in error thus states its position:

"*There was no attempt made to impound any earnings. No application for a receiver, and no attachment taken out. Neither was any lien claimed on the corpus of the property of the defendant.* It was nothing more than a personal suit for an accounting between the two parties to a contract," etc. (Brief, p. 5.)

"A form of judgment which the Court of Appeals has since said in this action was '*essentially a personal judgment upon which the Court might have ordered execution to issue.*' (Page 6.)

"What, therefore, the Court meant by saying that the *proceeding*, seeking a judgment, was *essentially in rem*, but that the judgment, when thus obtained, was *essentially in personam*, we confess our inability to explain." (Page 14.)

Finally plaintiff thus states its proposition:

"QUESTION.—The question involved in this case is simply this: Where a personal judgment is entered against A. B. for a specified sum of money, can an execution, or a rule to pay same, be issued thereon against C. D., who is not named in the judgment, and is not even a party to the cause? And if this is done, and C. D.'s property is taken to satisfy the judgment, is this 'due process of law?'"

Plaintiff admits that the judgment assailed was for "the amount of earnings which the Court held that the defendant (L., C. & L. Co.) had received," but to sustain the claim that it is a judgment *in personam*, and not *in rem*, it contends

that the subject of the suit was nevertheless *money*, which "had no ear marks." (Page 31.)

### Curious Result of Plaintiff's Position.

Plaintiff's own statement of its position, therefore, resolves its contention into the curious anomaly that plaintiff has not had due process of law *because money has no "ear marks."*

## III.

### Meaning of Due Process of Law as Applicable to this Case.

It appears, as above shown, that plaintiff in error defended for nearly nine years the suit to enforce the mortgage lien upon the earnings of *its* railroad, and upon rule to pay into Court the amount of such earnings, asserted defenses *not previously litigated*, and that such defenses were upon the rule considered and adjudicated; that it showed no evidence of having any other defenses, contenting itself with the declaration that if sued "it could and would present good, valid, and subsisting defenses" not specified; that defendants in error promptly combatted all the defenses presented in the response to the rule, defeated some, others prevailed, but could not compel plaintiff to assert its defenses, and there is no reason to suppose that any defense urged would not have been tried, nor indeed that plaintiff had any other defenses; so plaintiff stands in this Court upon the most narrow and strictly technical claims.

In Davidson vs. New Orleans, 96 U. S., 97, this Court, observing how long the provision in question had applied to the Federal Government, and how short a time to the States, and yet so large a number of cases had arisen in the States, said:

> "Thus is there abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact, it would seem, from the character of many of the cases before us, and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this Court, the abstract opinions of every unsuccessful litigant in a State Court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded," etc.

This Court has often expounded due process of law as applicable to the case in Court, and never announced any rule which would condemn the judgment now assailed.

A litigant is not entitled to any particular kind of procedure, nor does the "Fourteenth Amendment"

> "Profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line." (*Missouri vs. Lewis, 101 U. S., 31; Brown vs. New Jersey, supra.*)

> "Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State. Our power over that law is only to determine whether it is in conflict with the supreme

law of the land; that is to say, with the Constitution and laws of the United States made in pursuance thereof, or with any treaty made under the authority of the United States. (Art. VI., Const.) Here the State Court has decided that the proceeding below was in accordance with the law of the State; and we do not find that to be contrary to the Constitution, or any law or treaty of the United States." (*Walker vs. Sauvinet, 92 U. S., 93.*)

"The State has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution." (*Brown vs. New Jersey, supra.*)

"The State is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary." (*Hurtado vs. California, 110 U. S., 516; Brown vs. New Jersey, supra.*)

Accordingly, it is held that, although an indictment by grand jury was an essential preliminary to trial for felony at common law, it is within the power of a State to abolish it entirely and proceed by information. (*Hurtado vs. California, supra, etc.; Hodgson vs. Vermont, 168 U. S., 262; Bolln vs. Nebraska* (*No. 393*), *decided January 15, 1900.*)

Proceedings for tax assessments may be summary, the only essential preliminary being the opportunity for a hearing upon the question of assessment. (*Bellingham Bay, etc., R. R. Co. vs. City of New Whatcom, 172 U. S., 320.*)

The same is true of proceedings in *ad quad damnum.* Accordingly this Court holds, upon a review of authorities, that:

> "Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." (*Leeper vs. Texas, 139 U. S., 468; Brown vs. New Jersey, supra.*)

> "Whether better or no than any other method, it is certainly a fair and reasonable way of securing an impartial jury, as provided for by the laws of the State, and that is all that due process in this respect requires." (*Brown vs. New Jersey, supra.*)

> "But it is clear that the Fourteenth Amendment in no way undertakes to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and provides fair opportunity to be heard before the issues are decided. This being the case, it was obviously not a right, privilege, or immunity of a citizen of the United States to have a controversy in the State Court prosecuted or determined by one form of action instead of by another. It is also equally evident, provided the form sanctioned by the State law gives notice and affords opportunity to be heard, that the mere question of whether it was by a motion or ordinary action in no way rendered the proceeding not due process of law within the constitutional meaning of those words." (*Iowa Central Railroad Company vs. Iowa, 160 U. S., 389.*)

From the foregoing brief quotation of this Court's language it is obvious that the requirement of due process of law does not entitle plaintiff to any particular kind of procedure general in its application to all the States, but that it is only entitled to the procedure in force in this State, unless it "work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution."

And that the decision of a State Court that the procedure in the case in hand "was in accordance with the laws of the State" is accepted as conclusive by this Court.

It is equally well settled that whether the procedure be by action, rule, motion or other method, it is due process of law, "provided the form sanctioned by the State law gives notice and affords an opportunity to be heard."

Accepting the decision of the State Court as evidence of the State procedure—and especially where it is declared by that Court to be based upon its previous decisions—the sole question presented to this Court is whether or not the plaintiff in error had notice and an opportunity to be heard in the State Court.

In support of its decision the State Court invoked a long line of authorities, State and Federal, defining *dominus litis*, and declaring plaintiff in error concluded by the judgment in the case in the trial of which it had participated.

We shall not review these authorities; they are collated in the opinion, *99 Ky., 143*, and briefs filed by us on motion,

viz., of John G. Simrall, page 26, *et seq.*, of Edmund F. Trabue, page 20.

To the authorities cited should be added *Plumb vs. Crane, 123 U. S.*, and *Washington Gas Light Co. vs. District, 161 U. S., 316.* Not only do these decisions conclude plaintiff in error on the question of notice, but, as above indicated, plaintiff now concedes that its conduct in this suit prior to the rendition of the judgment of 1894 "*would be conclusive evidence against it on certain points adjudicated therein.*" (Brief, p. 37.)

Being concluded by the adjudication, plaintiff was necessarily a party to the controversy culminating in the adjudication. This was true either because the summons delivered to its President was service upon it or because it voluntarily entered its appearance. Either service of process or voluntary appearance would conclude plaintiff by the adjudication and affect it with legal notice of the pendency and result of the suit. It remains, therefore, only to inquire if plaintiff was afforded "an opportunity to be heard."

## Opportunity to be Heard.

If plaintiff had an opportunity to be heard there was due process of law, because its failure to be heard was its own fault. Accordingly, the State Court properly concluded that plaintiff in error was a party, upon the facts asserted by defendants in error and not controverted, and correctly held plaintiff concluded by the judgment. Being *dominus litis*,

plaintiff in error was, upon the authorities invoked in the State Court, concluded not only by what was decided, but by what might have been properly decided in the suit; thus in *Eagle Mfg. Co. vs. Bradley Mfg. Co.*, *50 Fed.*, *193* (affirmed on appeal, *57 Fed.*, *980*), the Court declaring one whose name did not appear of record, concluded by the judgment in the case where its acts had made it *dominus litis*, said of it:

> "The rule laid down in Robbins vs. Chicago City, 4 Wall., 657, seems to me fully applicable in this case. There the Court said:
>
> "'The conclusive effect of judgments respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination.'
>
> "Parties in that connection include all who are directly interested in the subject-matter, and who had a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. And this same rule is restated and followed in numerous cases, among which are Beloit vs. Morgan, 7 Wall., 619; Miller vs. Liggett, etc., Co., 7 Fed. Rep., 91; Claflin vs. Fletcher, *Id.* 851; American Bell Tel. Co. vs. National Imp. Tel. Co., 27 Fed. Rep., 666; Morse vs. Knapp, 37 Fed. Rep., 352; Lea vs. Deakin, 11 Biss., 23, 13 Fed. Rep., 514; Wilson's Ex'r vs. Deen, 121 U. S., 525, 7 Sup. Ct. Rep., 1004.
>
> "The proof in this case shows beyond doubt that the defendant in this case, with the consent of the defendants in the Iowa case, made itself the *dominus litus* in

> that case: it controlled the defense; appeared by its own attorneys; it was the manufacturer of the plows in which the alleged infringement was found; and may, I think, with entire propriety, be held to be bound, not only upon all the questions which were raised and determined in the former case, but upon all which might have been raised and determined in that case."

On appeal the Court composed of Gresham, Woods and Jenkins, Judges, considered elaborately the contention that the *dominus litis* was not concluded because a new defense not involved in the former case was asserted, and rejected the defense because it might have been asserted in the former case.

*Plumb vs. Crane, 123 U. S., 560*, a case overlooked by the State Court, and by counsel in that Court, is a strong authority for *defendants in error*. The suit was by Goodnow, assignee of the Iowa Homestead Co., to recover taxes for back years on Des Moines river lands. Plumb was defendant below, and answered *prior adjudication in the suit of Iowa Homestead Co. vs. Des Moines Nav. R. R. Co., 17 Wall., 153*, as a bar to the action. His defense was denied on the ground that he was not a party to that suit. It appeared that Wade was the defendant *of record*, but that he was not the owner of the land covered by the taxes, having been a trustee thereof and sold the land, which was purchased for Plumb, who was then the owner. Plumb hearing of the suit had employed counsel who defended in the name of

Wade. He controlled Wade's defense, and bore the expense. This Court said of the judgment appealed from:

> "The judgment was not only against Plumb personally, but it was made a special lien on the lands, which were the subject of taxation, because he was actual owner at the time of the levy. . . . In this there was error, in our opinion. . . . If there had been a decree against Wade for the taxes and a lien therefor established on the lands, he would have been bound, and could not have resisted the enforcement of the lien. So, too, if a personal decree had been rendered against Wade for the money, it would have been conclusive in an action by Wade to recover from him money paid for his use in satisfaction of the decree. He was bound, because he was represented in the suit by Wade, under whom he claimed. This case is the converse of that of Litchfield's Admr. vs. Crane, *ante*, 199. There Mrs. Litchfield was not represented in the suit by anyone who was a party, and, therefore, she could not claim the benefit of the decree. Here Plumb was represented by Wade, and he stands, consequently, as if he had been himself a party by name."

What prevented plaintiff in error being heard? It is uncontroverted that it controlled the defense; that the nominal defendant was practically defunct, possessing only the franchise to exist; and that its President was the same man who was President of plaintiff in error; that it had no treasury, but that plaintiff's treasury defrayed the expenses of the prolonged litigation, resulting in the judgment which it now attempts to repudiate. The excuse offered for not setting up the defenses which it now declares that it possessed

is that the pleadings in the case were not appropriate, still it made no attempt to obtain a reformation of the pleadings. As controller of the defense made in the name of the L., C. & L. Co. it never at any time pleaded a defect of parties to compel defendants in error to amend their petition and make plaintiff in error a defendant by name, so that it might assert defenses, if any it had, in addition to what might be urged in the name of the L., C. & L. Co. Having absolute dominion of the defense there was no obstacle whatever to this course, but plaintiff preferred to urge only those defenses maintainable on the face of the pleadings as they stood, and even the litigation of those consumed nearly nine years.

Or, plaintiff in error, irrespective of the volition of the nominal defendant, L., C. & L. Co. (assuming that defendant had volition), had a right under the Kentucky Statutes to compel defendants in error to make it a defendant so that it might assert upon its own account, and in its own name, any defense it pleased to the attempt to subject to the lien of the mortgage the earnings of plaintiff's railroad. The Statute is as follows, Civil Code, Sec. 29:

> "In an action or proceeding for the recovery of real or personal property or for the subjection thereof to a demand of the plaintiff under an attachment or other lien, any person claiming a right to, or interest in, the property or its proceeds, may, before payment of the proceeds to the plaintiff, file in the action a verified petition, stating his claim and controverting that of the

> plaintiff; whereupon the Court may order him to be made a defendant; and upon that being done, his petition shall be treated as his answer. But if he be a non-resident he must give security for costs."

The decision in *Miller vs. Desha, 3 Bush, 212*, expounding a similar Kentucky Statute, is especially valuable in this connection. Miller had attached a slave as the property of defendant, Cromwell, whose daughter, Mrs. Desha, claimed the slave, and executed a forthcoming bond. Miller prevailed, and the slave was sold in satisfaction of the bond, whereupon Mrs. Desha sued Miller for the value of the slave. The Court, recalling the statute providing for the claimant presenting petition disputing the validity of the attachment, or asserting an interest in or lien upon the attached property, said that the object of the statutory provisions was to afford a summary remedy for the trial of such claims, and that the claimant failing to file a petition in the case asserting title, should neither sue the purchaser, nor judgment creditor,

> "Because, having executed the bond, he has legal notice that a suit is pending to subject the property, and if he remains quiescent as to his claim, until, by judgment, it is subjected to the attachment, he shall then neither be heard in the defense to the bond nor on a suit for the recovery of the money or the property."

Having, therefore, notice of the suit; indeed, having controlled the defense, and, having had an opportunity to defend either in the name of the L., C. & L. Co., or in its own name

also; and, having elected to defend in the name of the nominal defendant, instead of its own, plaintiff in error has not been denied due process of law; and, indeed, if it has lost the opportunity of any defense, it has been solely through its own fault.

Consequently, there would seem to be an end of discussion, and no occasion to consider the fine distinctions elaborated in the State Court, and now transferred to this Court. To meet the full issue presented, however, we shall briefly respond to the claims made by the defendant.

## The State Court had Territorial Jurisdiction of the Subject Matter.

In the multitude of authorities invoked by the State Court to sustain its adjudication that plaintiff in error was a party to this suit, and bound by its result, the judgments were mostly *in personam*, and although conceding that it is bound by the adjudication in this suit on the principal questions involved, plaintiff in error contends that it is not concluded by the judgment to pay into Court the earnings ascertained by the judgment to be covered by the mortgage, because it declares that such judgment is *in personam* and not *in rem*.

A careful consideration of plaintiff's contentions seems to indicate that they are based upon a misconception of this Court's decision in *Pennoyer vs. Neff, 95 U. S., 714.*

Accordingly, we find plaintiff observing that we neither obtained an attachment nor applied for a receiver, and insisting that our proceeding was simply for an accounting.

Attachment was unnecessary, a mortgage lien already existing, and the suit being to foreclose the lien, it is "immaterial whether the proceeding against the property be by attachment or bill in chancery." (*Pennoyer vs. Neff.*) Nor is receivership essential to jurisdiction. On the contrary, the jurisdiction would be essential to receivership. An unsecured creditor is not entitled to receivership, but receivership presupposes lien.

> "And to warrant the interposition of a court of equity by the aid of a receiver, it is essential that the plaintiff should show first, either a clear, legal right in himself upon it, or that it constitutes the special fund out of which he is entitled to satisfaction of his demand." (*High Rec., Sec. 11.*)

In all the cases where this Court has appointed receivers at a mortgagee's suit, it has been in foreclosure proceedings in enforcement of mortgages. Such proceedings are *in rem*, and we shall hereafter refer to this point at length.

Without now discussing the distinction between proceedings *in personam* and *in rem*, it sufficeth to say that this proceeding is to subject property within the territorial limit of Kentucky, and, therefore, the doctrine of *Pennoyer vs. Neff*, by express declaration of this Court, does not assist plaintiff. This Court there condemned a statute providing

personal judgment enforcible everywhere, upon personal service outside the State; but said:

> "Jurisdiction is acquired in one of two modes: First, as against the person of the defendant by the service of process; or, secondly, by a proceeding against property of the defendant within the jurisdiction of the Court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question, and it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*."

> "An agreement as to the produce of land will affect the land itself." Legard vs. Hodges, 3 Bro. C. C., 538.

The judgment of foreclosure might have been enforced by receivership of the earnings of the railroad.

The judgment in the State Court in our case affected only the earnings covered by the mortgage. The Court thus characterized its judgment:

> "In our judgment the question presented by this appeal is one of procedure. This suit is essentially a proceeding *in rem* to subject to appellants' claim the net profits made on business coming to the line of the Louisville, Cincinnati & Lexington R'y Co. from and over the Cumberland & Ohio. If the averments of the affidavit are true, then the Louisville & Nashville R. R. Co. operated the Cumberland & Ohio, as well as the Louisville, Cincinnati & Lexington R'y, by virtue of the sale to it of the latter's property and the assignment of the lease and contract, which it undertook to perform; received the net profits referred to; defended this suit

in the name of the Louisville, Cincinnati & Lexington R'y Co.; and was a real defendant in this action. Assuming these averments to be true, the sole question is whether the appellants are required to bring a separate and additional suit against the Louisville & Nashville R. R. Co., making these averments and setting up the record in this case, or whether in this same suit the question may be determined upon response to rule whether or not the Louisville & Nashville R. R. Co. was a real defendant in this action." (App. II. to former brief of Edmund F. Trabue, page 36.)

The exposition by the State Court of the nature of its judgment is treated by this Court as conclusive. (*Wood vs. Brady, 150 U. S., 221.*)

This Court there said:

> "The question whether an action to foreclose a lien of this kind is *in rem* or *in personam* under the practice in California is one upon which the decision of the Supreme Court is binding, and its ruling that plaintiff, being no party to defendant's suits to foreclose, had a right to show by evidence *aliunde* the invalidity of the judgments obtained by them is not a proper subject for review by this Court."

This Court treats as equally conclusive the decision of the State Court as to the nature of a lien created by a mortgage. Indeed the construction of contracts affecting land is, according to the doctrine of this Court, solely for the State Court. In this instance the State Court not only treated the contract as creating a lien upon the earnings of the railroad in question, but for nearly nine years proceeded to enforce that lien

without a question being raised as to the nature or effect of the lien.

The State Court's declaration, so much commented on by plaintiff, that the judgment directing the L. & N. to pay into Court was "essentially *in personam*," is not only not inconsistent with the adjudication that the proceeding prior to the judgment of foreclosure was *in rem*, but is strictly accurate. A judgment enforcing a mortgage lien is *in rem*, but the procedure to execute the judgment is *in personam*, viz., by process of contempt, rule, attachment, etc. (Scott vs. Coleman, 5 Mon. (Ky.), 75; Kershaw vs. Thompson, 4 John Ch., 609.)

Instead, therefore, of showing a case within the principle ruling the decision in *Pennoyer vs. Neff*, plaintiff in error shows a case expressly declared therein to be excluded from the principle.

### Summary Proceedings are Due Process.

We have shown that the requirement of due process does not forbid proceedings by motion any more than by action or suit, if only there be notice and opportunity to be heard. (*Iowa Central R'y Co. vs. Iowa*, *supra*.) But the most familiar instance of such proceedings is that by petition against *pendente lite* purchasers. On such petitions such purchasers are not permitted to reopen the litigation concluded by the judgment of foreclosure. The reason is two-fold:

*First*, there must be an end of litigation; *secondly*, the purchaser has already been heard through his vendor.

The purchaser *ante litem motam* is not concluded by the judgment of foreclosure nor liable to proceedings by petition unless he have had an opportunity to be heard.

The suggestion of the positions of the purchaser *pendente lite* and the purchaser *ante litem motam* and the reasons governing their rights demonstrates the propriety of the rule issued against plaintiff in error. It has had its day in Court by reason of being heard in its vendor's name, and having had full opportunity to be heard to any extent it pleased. Its opportunities, therefore, have been even greater than those of a *pendente lite* purchaser, and, being concluded by the judgment of foreclosure, there is no reason denying such purchaser an independent hearing that is not strictly applicable to plaintiff in error.

For this reason, also, the judgment against plaintiff in error on the rule to pay into Court the earnings in its hands covered by the mortgage, is as obviously proper as the judgment against any tenant in possession of mortgaged property, real or personal, having had opportunity to be heard.

## THIS IS A PROCEEDING IN REM.

The entire argument of plaintiff in error is based upon a statement of the nature of the action, which we maintain is absolutely without foundation.

The opening sentence of his brief is:

> "The question involved in this case is simply this: Where a personal judgment is entered against A. B. for

a specified sum of money, can an execution or a rule to pay the same be issued therein against C. D., who is not named in the judgment, and is not even a party to the cause? And if this is done and C. D.'s property is taken to satisfy the judgment, is this due process of law?"

Now we say "that the question involved in this case" is exactly the opposite of that.

We do not seek in this action to recover a personal judgment against anybody.

It is a proceeding *in rem.*

The object of the action is to subject the earnings of the railroad company to the payment of the interest on our bonds under a duly recorded mortgage, which not only gives us a lien upon those earnings, but provides expressly that these identical earnings shall be applied as they accrue to the payment of the coupons of the bonds as they mature.

The petition and amendments, R. P's., 2 and 69, set up in apt terms the lease and mortgage under which our lien was created, and ask for an accounting; that the case be referred to the Commissioner to ascertain the earnings covered by our lien, and when ascertained, that they be paid into Court and applied to discharge the interest on our bonds in accordance with the terms of the mortgage.

Plaintiff in error seeks to avoid the effect of our claim by saying that you have not attached these earnings nor taken possession of them through a receiver, and therefore your right to enforce your lien on the earnings has not been per-

fected. And on page 30 of the brief it is said: "Pending the litigation the possession of the property was left undisturbed with the rights in the possessor to collect and use the earnings thereof."

The whole trouble in this controversy grows out of an utter disregard or misconception of the terms of our mortgage by the railroad company. It has proceeded on the idea that this is an ordinary railroad mortgage of earnings, with the usual provision that after default for such a length of time in paying interest on the bonds, the trustee for the bondholders may demand or take possession of the road and operate it for the benefit of the bondholders, or the earnings may be intercepted through a receiver.

Because in every such mortgage there is either an express or implied covenant that the railroad company, as long as it retains possession of the road, shall receive and apply the earnings for operating expenses and other purposes as the railroad company, in its discretion, may see fit.

This grows out of the nature of the railroad business—the necessity for the use of its income. Hence, its mortgages are usually drawn in that form.

But our mortgage is exactly the opposite of that. It denies the right of the railroad company to use as it pleases the earnings covered by the mortgage. On the contrary, it provides that from the maturity of the first coupon until the payment of the last bond and coupon, *and whilst the railroad company remains in possession of the road*, these earnings, *as*

*they accrue*, shall be applied to the payment of the coupons *as they mature.*

Our right to enforce our lien on the earnings, as we have done in this case, under such a mortgage, we think is well established.

In case of Ketchum vs. St. Louis, 101 U. S., 306, where, under an act of the General Assembly of Missouri, the county of St. Louis loaned its bonds to amount of $700,000 to the Pacific Railroad Company, under an agreement that the interest should be paid out of the earnings of the road, this Court held (opinion by Mr. Justice Harlan) that it created an equitable lien or charge in favor of the county upon the earnings of the road to the extent necessary to meet the interest upon the bonds as it accrued. The Court further held that where the road was placed in the hands of a receiver, in a suit to foreclose a subsequent mortgage, the lien or charge in favor of the county was enforceable, not only against the funds in the hands of the receiver, but against a purchaser under the decree, and against whosoever may hold the road or have the custody of its earnings.

The Court rested its opinion upon this proposition of law that

> "If a debtor by a concluded agreement with a creditor sets apart a specific amount of a specific fund in the hands or to come into the hands of another from a designated source, and directs such person to pay it to the creditor, which he assents to do, this is a specific appropriation, binding upon the parties, and upon all persons

with notice, who subsequently claim an interest in the fund under the debtor."

The case at bar is much stronger than that, for we have not only an express covenant in the mortgage by the Railroad Company that it will appropriate and apply these particular net earnings, as they accrue, on business coming to it from the Cumberland & Ohio Road to the payment of the interest on these bonds as it matures, but also a lien is given the bondholders on these identical earnings to place the security beyond peradventure, and this mortgage was duly recorded, giving notice to all the world.

Mr. Justice Harlan also quotes with approval in that opinion the following authorities:

In Legard vs. Hodges, 1 Ves., 478, Lord Thurlow said:

"I take this to be a universal maxim that wherever persons agree concerning any particular subject that in a court of equity as against the party himself, and any claiming under him voluntarily or with notice, raised a trust." . . . and "I take this to be true that when parties come to an agreement as to the produce of land, the land itself will be affected by the agreement."

And Pinch vs. Anthony, et al, 8 Allen (Mass.), 536:

"It is well stated that a party may by express agreement create a charge or claim in the nature of a lien on real estate as well as personal property of which he is the owner or in possession, and that equity will establish and enforce such charge or claim, not only against the party who stipulated to give it, but also as to third

persons, who are either volunteers, or who take the estate on which the lien is agreed to be given, with notice of the stipulation, such agreement raises a trust which binds the estate to which it relates, and all who take title thereto with notice of such trust can be compelled in equity to fulfill it."

In the case of United States Trust Co. vs. Wabash Railway (opinion of Court by Mr. Justice Brown), 150 U. S., page 306, this Court said:

"But the mortgage or deed of trust to the Trust Company, the petitioner did not purport to convey any of the incomes or earnings of the road, but provided that if default should at any time occur in the payment of interest, the trustee should, when requested to do so, take possession of the mortgaged property and operate the same and collect and receive all the tolls and income therefrom, and it was also provided that until such default the mortgagors should be entitled to have and to hold the possession of the railroad and collect, receive and retain all the revenues arising from its use." . . . "*Now if the mortgage had covered the earnings and rentals of the property, and those had constituted a part of the estate conveyed to the Trust Company as security for the bonds, there would be some reason for saying that it would be entitled to these earnings and rentals in this action, before it demanded possession of the road.*"

"But where the mortgage provided that the mortgagor should remain in possession until default, but when default occurs, the trustee may enter, this Court has held that the trustee can only secure the earnings of the mortgaged property by taking or demanding possession."

The Court, in support of that opinion, then quotes from the case of Galveston Railway vs. Cowdrey, 11 Wallace, 459, where it was held:

> "That even where the mortgage covered the tolls, income and profits of the railroad whenever the company should be in default of payment, but a subsequent clause that in case the company should be in default in payments of principal or interest for three months, the trustee should take possession of the road and collect and receive the tolls, income and profits, etc., it was held that until regular demand was made for the payment of tolls and income, the defendants were not bound to account therefor."

This is as far as the courts have gone. And in every such case, as far as we have been able to discover, the opinions of the courts are based upon the ground that in ordinary railroad mortgages, even where the income or earnings are mortgaged in general terms, there is an express or implied agreement that the railroad company shall remain in possession and receive the income or earnings and apply them for its own purposes as it shall see fit, until there has been default made in the payment of interest and possession taken by and through the trustee or receiver.

But we have been unable to find a single case, and doubt if one has ever been or can be found, where any respectable court has held that where the mortgage gives a lien upon the earnings and provides in express terms that the railroad company *itself* shall appropriate and apply these earnings *as they*

*accrue* to the payment of the coupons on the bonds *as they mature*, that it was necessary or proper in order to accomplish this purpose for the bondholders to take possession of the road or fund, either through the trustee or a receiver.

It is manifest from the opinion of Mr. Justice Brown, just quoted, that he did not consider it necessary to take possession in order to entitle the bondholders to receive the earnings under such a mortgage.

His language is:

> "Now if the mortgage had covered the earnings and rentals of the property and those had constituted a part of the estate conveyed to the Trust Company as security for the bonds, there would have been some reason for saying that it would have been entitled to recover these earnings and rentals in this action before it demanded possession of the road."

The doctrine for which we are contending was again announced by this Court in the case of Freedman Savings Co. vs. Shepherd, 127 U. S., page 502. Opinion by Mr. Justice Harlan. The Court says:

> "*It is of course competent for the parties to provide in the mortgage for the payment of rents and profits to the mortgagee, while the mortgagor remains in possession.* But when the mortgage contains no such provision, and even where the income is expressly pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon the failure of the mortgagor to perform the conditions of the mortgage, the general rule is that the mortgagee is not entitled to the rents and profits of the mortgaged premises until he

takes actual possession or until possession is taken in his behalf by a receiver."

The general rule on this subject is that stated in the American and English Encyclopedia of Law, Vol. 19, page 208, under head of "Railroad Securities:"

> "If the mortgage implies that the mortgagor is to hold possession and receive the earnings of the road until the mortgagee takes possession, they are not subject to the liens of the mortgage so long as they are allowed to remain in the possession of the mortgagor."

But in a foot note to that page of same volume the well-known exception to that rule is most clearly stated in the case of Pullan vs. Cincinnati, etc., R. Co., 5 Biss, U. S., 237, as follows, to-wit:

> "Notwithstanding the general rule that the mortgagor is entitled to the earnings and profits of the mortgaged property while in possession or until some action is taken by the mortgagee, it is competent for the parties to agree in the mortgage that such future earnings and profits shall be held in equity by the mortgagee and under such a contract, such income whenever received is operated upon by the mortgage, and the party receiving it *holds it in trust for whoever in equity is entitled to it.*"

That it may be seen at a glance that our mortgage comes within the rule contended for, we here copy it in full:

> "This indenture of a mortgage, made and entered into by and between the Louisville, Cincinnati & Lexington R'y Co., a railway corporation under the laws of

the State of Kentucky, party of the first part, and Joshua F. Speed, as trustee, party of the second part:

"Witnesseth, That, whereas, by authority of an act of the General Assembly of the Commonwealth of Kentucky, approved the 18th day of March, A. D. 1878, the party of the first part has entered into a contract with the Northern Division of the Cumberland & Ohio R. R. Co. for the lease, construction and operation of the latter company's line of road from Eminence, in Henry county, Ky., through a part of said county and the counties of Shelby, Spencer, and into Nelson county as far as Bloomfield, all in the State of Kentucky, said lease to continue for thirty years upon the terms therein set out, in which it is stipulated by and on behalf of said first party herein that if the net earnings of said leased premises do not prove sufficient to pay the interest and to provide for the sinking fund of three hundred and fifty bonds of $1,000 each, bearing interest at the rate of seven per cent. per annum, payable half-yearly, on the first days of June and December, and having twenty years to run from the 2d day of July, A. D. 1879, to be issued by said Northern Division of the Cumberland & Ohio R. R. Co.; and if all other sources of raising money of said Northern Division of the Cumberland & Ohio R. R. Co. fail to provide for said interest and sinking fund, then said first party herein should supply the deficiency so far as the same may be done by appropriating the net earnings, or so much thereof as may be needed, on its own lines which may accrue to it by reason of business coming to it from or over the said lines of the said Northern Division of the Cumberland & Ohio R. R. Co.; and whereas, said contract or lease has been fully consummated by action of the stockholders of the first party herein, and it is now desired to carry into effect the said stipulations as to said net earnings.

"Now, in consideration of one dollar cash in hand paid by second party to said first party and the premises, the said first party has this day and does hereby mortgage and put in lien all net earnings which may accrue to it by reason of business coming to it from or over said lines of the Northern Division of the Cumberland & Ohio R. R. Co., to the said Joshua F. Speed, as trustee, aforesaid (who is the trustee in the mortgage made by said Northern Division of the Cumberland & Ohio R. R. Co. to secure said three hundred and fifty bonds of $1,000 each), conditioned that if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking fund of said mortgage bonds, then said first party, if all other sources of raising money of said Northern Division of the Cumberland & Ohio R. R. Co. prove insufficient, will supply the deficiency, so far as it may be done, by appropriating and paying over promptly the net earnings, or so much thereof as may be needed on its own lines, which may accrue by reason of business coming to it from or over said Northern Division of the Cumberland & Ohio R. R. Co.'s lines, for the purpose of discharging said interest and sinking fund as they severally fall due.

"In testimony whereof, the said first party, acting under the authority and approval of the stockholders, duly assembled in stockholders' meeting on the 28th day of July, 1879, has caused these presents to be signed in duplicate, in its corporate name, by its President, and countersigned by the Secretary, and its corporate seal hereto affixed this 28th day of July, A. D. 1879."

This mortgage made in this way was not the result of accident, but grew out of a peculiar state of facts.

The railroad company desired to construct this little railroad in Kentucky, known as the Cumberland & Ohio,

Northern Division, running a distance of about thirty miles from Shelbyville to Bloomfield, in order to operate it as a feeder to and in connection with its own lines, running from Shelbyville to Louisville, Lexington and Cincinnati.

In order to raise money to build the road, in addition to county subscriptions, it was proposed that bonds should be issued to the amount of $250,000, to be secured by a first mortgage on this Cumberland & Ohio road. The trustee named in this mortgage was Joshua F. Speed. He at once saw that a mortgage on this little branch road would be of no value to secure the payment of interest on the bonds, and the bonds, as they matured. It was evident that it would not pay even operating expenses, but, as a feeder to the Nashville Railroad system it would be of great value, so that Mr. Joshua Speed, trustee, proposed to the railroad company that, in order to induce these bondholders to invest in the bonds, the railroad company should guarantee the payment of the bonds and interest, and the railroad company agreed to it. But, when the contract was about to be consummated, the attorney for the railroad company advised that, under the amended charter of the company, it could not guarantee the bonds of another corporation, but that, in lieu of that, it was competent for the railroad company to mortgage the earnings on its own lines on business coming to it from or over the Cumberland & Ohio Railroad Company, Northern Division, and, in pursuance of this, and, as a substitute for the guarantee, this mortgage was executed.

In view of this, how preposterous is the contention that, in order to entitle us to these earnings, we must take out an attachment or have a receiver appointed. The agreement under the mortgage was express that the railroad company, *while it was in possession*, would itself, *as the earnings were received*, apply them to the payment of the coupons *as they matured*. Thereby the railroad company constituted itself as a receiver or trustee for the bondholders by the express terms of the contract. And if the bondholders had gone into court and had a receiver appointed, all that the receiver could have done would be to do as the railroad company had agreed to do—to receive these earnings as they accrued and appropriate and apply them to the payment of the coupons as they matured.

But the railroad company says, "You can't enforce your lien upon these earnings, because it is money and has no *ear marks*."

That is another fatal mistake the railroad company makes. Our mortgage is upon particular earnings that can be ascertained with mathematical certainty. The mortgage is upon the net earnings that the railroad company makes on business coming to it from or over the Cumberland & Ohio Railroad Company (Northern Division.) There is no dispute whatever as to what these earnings are. The railroad company furnishes them to us in exact dollars and cents, and we admit the accuracy of its statement. The only controversy that has ever been in this case has been as

to the amount of the *operating expenses proper to be deducted* from these earnings in order to show the amount of net earnings covered by our lien under the mortgage.

The first report of the Commissioner, under the instructions of the Court that there should be deducted from the gross earnings of the Cumberland & Ohio business only such additional expense as was entailed by the handling of this business, showed net earnings covered by our lien amounting to $213,590.28. (See record, page 62.)

But the Court finally allowed to be deducted from our fund, as operating expenses, a certain proportion of the expenses of the entire Louisville & Nashville Railroad system, including the President's salary and terminal facilities in New York City, thus leaving the net earnings on business coming from the Cumberland & Ohio Road, which our lien covered, only $60,192.27. (See record, page 65.)

And when this was ascertained, it was the identical fund which our mortgage covered. It was derived from the source designated in the mortgage, with an express condition in the mortgage that this identical money should be appropriated and applied to pay our coupons as the interest on the bonds matured. *Id certum est quod certum reddi potest.* It was nothing like an agreement by the railroad company to pay this interest out of its moneys or earnings generally.

But this particular fund, from this particular business, was put in lien and appropriated for this particular purpose, and it won't do for the railroad company to say "we have

mingled this fund with our moneys generally and thereby destroyed its ear marks." It was your duty to keep this fund separate as covered by our lien under the mortgage, and a court of equity will treat it as having been done, and enforce our lien upon the fund, when the amount is ascertained; and we have ascertained it by the figures you furnished yourself to the exact amount of dollars and cents.

The proceeding to enforce this lien is a proceeding *in rem*, as sustained by the authorities referred to in our former brief, and as expressly decided by our Court of Appeals; and all that the Nashville Railroad Company was entitled to was notice of the proceeding.

Mr. Milton Smith was President of both the L., C. & L. and the L. & N., and the Louisville & Nashville Railroad Company not only owned all the stock of the L., C. & L., but had bought and owned the road itself. Mr. Milton Smith was served with summons in this action, so that the Louisville & Nashville Railroad not only had actual notice of this proceeding, but admits that it has been operating all of these railroads and received all the earnings which are the subject-matter of controversy in this action, and has defended this suit in the name of the L., C. & L. Railroad (which it had previously bought and owned and still owns), and has employed the counsel and defrayed the entire cost of the defense, and conducted the litigation from beginning to end; and the President of the L. & N. has given a lengthly deposition in the action (Record, pages 184 to 190 inclusive), and on page

190 he undertakes to show that the report of his own Auditor, Sewell, allowing us net earnings from December 1, 1882, to June 30, 1890, of $60,192.27, which is the basis of the judgment, was erroneous; and speaks of these earnings as having been derived by the L. & N. and points out the enormous cost of operation which should be deducted. In other words, the President of the Louisville & Nashville Railroad Company brings his company into this action—even if it had not been served with notice—and for fourteen years defends this suit, and controverts our right to these earnings, covered by the lien, which it admits are in its own possession; and after judgment has been rendered, ascertaining these earnings covered by the lien and directing them to be paid into Court, in order to pay the matured interest, the Nashville Railroad Company, who has been the real defendant all the time, with our money in its pocket, says, after fourteen years or five thousand days (except Sundays) of the most stubborn and expensive litigation ever seen in the records of any court, (when the only question was or could be, which of us is entitled to this money?) I have never had any day in Court. Therefore, we are about to be deprived of our property without due process of law, and that is the Federal question we raise.

The only point upon which plaintiff in error and the defendants have ever agreed in this action is: That in all the ages that are past, there has never been found in any text book or adjudged case, one like this. And we do not believe

that in the ages to come there will ever be another, where a person or corporation admits of record that he has defended a suit for fourteen years and still claims that it never had a day in Court.

We ask the Court to read this brief in connection with the others heretofore filed by us on the motions to affirm or dismiss, and we respectfully ask an affirmance of the judgment of the State Court.

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Office Supreme Court U. S.
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No. 178.
Sup. Ct. of Tenn.
for D. C.

IN THE

# Supreme Court of the United States.

**OCTOBER TERM, 1899.**

Filed Mar. 14, 1900.

*No. 178.*

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THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, PLAINTIFF IN ERROR,

*vs.*

ADOLPH L. SCHMIDT, IN HIS OWN BEHALF AND AS TRUSTEE FOR THE BONDHOLDERS OF THE NORTHERN DIVISION OF THE CUMBERLAND AND OHIO RAILROAD COMPANY, ET AL., DEFENDANTS IN ERROR.

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## Supplemental Brief for Defendants in Error.

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I.

For additional authorities on due process of law, as applicable to this case, see:

*Wilson vs. North Carolina*, 169 U. S., 594; *Laing vs. Rigney*, 160 U. S., 531; *Central Land Company vs. Laidley*, 159 U. S., 112; *York vs. Texas*, 137 U. S., 15

II.

A prosecuting witness was adjudged liable for costs, although having no issue with any one, the verdict in favor of the accused finding (under Kansas statute) that the prosecution was with malice and without probable cause.

*Lawe vs. Kansas*, 163 U. S., 81.

III.

Mr. Helm's claims based on *section 90* of the Kentucky Code and on the New Jersey case concerning the scope of a judgment are matters for the consideration of the State court.

And the claim of a denial of *due process* was refuted by Mr. Justice Peckham's inquiry of Mr. Helm how the L. & N. Co. could have been denied *due process* or *opportunity to be heard* when it *had never attempted* to assert any defense that an opportunity to try it had not been afforded, and the laws of Kentucky procedure gave opportunity for assertion of any defense it chose to make.

IV.

Our position in regard to *Plumb vs. Crane*, 123 U. S., 560, is correct, as is shown in *Litchfield vs. Goodnow*, 123 U. S., 550, where this court said Mrs. L. was not represented by any party of record, and *therefore* no judgment could have been pronounced either in her favor or against her.

Mr. Bruce's suggestion that the principles governing the rights of Plumb were like those controlling the rights of *pendente lite* purchasers is sound. We make same suggestion as to L. & N. Co., and the analogy is complete (Brief, pp. 25, 26).

*Pendente lite* purchasers are bound, *first*, that there may be an end of litigation; *secondly*, because they have had

their day in court through their vendors. The reasons apply equally to *L. & N. Co.* and to *Plumb.*

We showed in the brief (pp. 21 to 26 and 31, 32, 33, and 34) that our mortgage covered certain earnings or income of the railroad of plaintiff in error (95 *Ky.*, 291).

*That the State had so decided, and that this court treats such decisions as conclusive.*

We might also have remarked that a mortgage of the income is, *pro tanto*, a mortgage of the thing producing the income.

*Ketchum vs. St. Louis*, 101 U. S., 306.
*Legard vs. Hodges*, 1 Ves., 478; 3 Bro. C. C., 538.

*Lord Coke* (1 Thomas Coke-Lyttleton, 238) says:

*g.* "But if a man, seized of lands, in fee, by his deed "granteth to another *the profit of those lands*, to have and to "hold to him and his heirs, and maketh livery *secundum* "*formam chartæ, the whole land itself doth pass; for what is* "*the land but the profits thereof;* for thereby vesture, herbage, "trees, mines, and all whatsoever, parcel of land doth pass."

*h.* "By the grant of the *boilery of salt*, it is said that the "soil *shall pass, for it is the whole* profit of the soil."

The contention of plaintiff in error, therefore, comes to this, that even if a mortgage on its railroad might be enforced in a case like this *without denying to it due process of law*, and although a mortgage upon the income might operate as a mortgage on the railroad producing it (or be so held by State court, and its judgment be conclusive thereof), yet to enforce the mortgage on the income would *deny due* process.

Very respectfully,

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